

EXHIBIT 3

REDACTED
PENDING MOTION TO SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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BIO-RAD LABORATORIES, INC. and PRESIDENT

AND FELLOWS OF HARVARD COLLEGE,

REPORTER CERTIFIED
TRANSCRIPT

Plaintiffs,

vs.

Civil Action No.

10X GENOMICS, INC.,

1:19-cv-12533-WGY

Defendant.

CONFIDENTIAL

CAPTION CONTINUED

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VIDEOTAPED STENOGRAPHIC DEPOSITION OF:

JAMES E. MALACKOWSKI

Tuesday, April 6, 2021

11:02 a.m. - 7:09 p.m.

Reported Remotely through Videoconference

CONFIDENTIAL

OUTSIDE ATTORNEYS' EYES ONLY INFORMATION

Reported stenographically by:

Richard Germosen, CA CSR No. 14391

RDR, CRR, CCR, CRCR, NYACR, NYRCR

NCRA/NJ/NY/CA Certified Realtime Reporter

NCRA Realtime Systems Administrator

Job No. 40704



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CAPTION CONTINUED

10X GENOMICS, INC.,

Counterclaim Plaintiff,

-and-

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Counterclaim Co-Plaintiff

as to certain claims,

vs.

BIO-RAD LABORATORIES, INC.,

Counterclaim Defendant,

-and-

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Counterclaim Co-Defendant as to

DJ counterclaims.

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1 VIDEOTAPED TELECONFERENCED STENOGRAPHIC
2 DEPOSITION of JAMES E. MALACKOWSKI, taken in the
3 above-entitled matter before RICHARD GERMSEN, Certified
4 Court Reporter, (License No. 30XI00184700), Certified
5 Realtime Court Reporter-NJ, (License No. 30XR00016800),
6 California Certified Shorthand Reporter, (License No.
7 14391), NCRA/NY/CA Certified Realtime Reporter, NCRA
8 Registered Diplomate Reporter, New York Association
9 Certified Reporter, NCRA Realtime Systems Administrator,
10 taken remotely on Tuesday, April 6, 2021, commencing at
11 11:02 a.m.

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13 ALSO PRESENT:

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I N D E X

WITNESS	EXAMINATION
JAMES E. MALACKOWSKI	
BY MS. HADZIMEHMEDOVIC	9

E X H I B I T S

EXHIBIT NO.	DESCRIPTION	PAGE
Exhibit 1	document entitled Expert Report of James E. Malackowski, February 5, 2021	12
Exhibit 2	document entitled Georgia-Pacific Corp. v. United States Plywood Corp.	81
Exhibit 3	document entitled Videotaped Deposition of James E. Malackowski, October 26, 2017	101
Exhibit 4	amendment number two to the realtime PCR instrument license	133

E X H I B I T S (CONT'D.)

EXHIBIT NO.	DESCRIPTION	PAGE
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Exhibit 5	trial transcript from the 152	147
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	trial	
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Exhibit 6	document entitled Videotaped	209
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	Deposition of John A. Luckey,	
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	Ph.D., Friday, September 11,	
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	2020	
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(exhibit index concluded)

P R O C E E D I N G S

11:02 a.m.

1:02:13 5 THE VIDEOGRAPHER: Stand by, please.

1:02:42 6 Good morning. We are going on the
1:02:49 7 record. The time on the screen is 11:02 a.m.

1:02:54 8 Eastern Standard Time. Today's date is April 6,

1:02:59 9 2021. We are located remotely via Zoom video

1:03:06 10 conferencing with all parties appearing remotely.

1:03:09 11 This marks the beginning of media
1:03:11 12 unit number one of the deposition of James
1:03:14 13 Malackowski, testifying in the matter of Bio-Rad
1:03:19 14 Laboratories, Inc., versus 10X Genomics, et al., and
1:03:24 15 related cross-actions venued in the United States
1:03:29 16 District Court for the District of Massachusetts,
1:03:34 17 case number is 1:19-cv-12533-WGY.

1:03:45 18 My name is David Manzo. I'm a legal
1:03:48 19 video specialist here on behalf of Chase Litigation
1:03:49 20 Services. The court reporter is Rich Germosen, also
1:03:55 21 here on behalf of Chase Litigation Services.

1:04:00 22 Counsel, would you please identify
1:04:01 23 yourself and state whom you represent.

1:04:05 24 MS. HADZIMEHMEDOVIC: Azra
1:04:05 25 Hadzimehmedovic. With me are Gina Cremona and

1:04:10 1 Ashley Nelson from Tensegrity Law Group here on
1:04:15 2 behalf of 10X Genomics, Inc.

1:04:19 3 MS. TU: This is Xiaoxi Tu from Weil
1:04:21 4 Gotshal & Manges on behalf of Bio-Rad.

1:04:28 5 THE VIDEOGRAPHER: Will the court
1:04:28 6 reporter please swear in the witness.

1:04:34 7 CERTIFIED STENOGRAPHER: Good
1:04:34 8 morning. My name is Rich Germosen. I am a
1:04:34 9 certified stenographic reporter. My license is
1:04:34 10 available for inspection.

1:04:34 11 Can I please have a stipulation from
1:04:34 12 all counsel present that you will not object to the
1:04:34 13 validity of this remote swearing now or in the
1:04:34 14 future?

1:04:56 15 MS. HADZIMEHMEDOVIC: Yes.

1:04:57 16 MS. TU: Yes.

17 (Whereupon, the Certified Realtime
18 Stenographer administered the oath to the witness.)

1:04:57 19
1:04:57 20 J A M E S E. M A L A C K O W S K I,
1:04:57 21 having been first duly sworn or affirmed, was
1:04:57 22 examined and testified as follows:

1:04:57 23 EXAMINATION BY MS. HADZIMEHMEDOVIC:

1:05:11 24 BY MS. HADZIMEHMEDOVIC:

1:05:12 25 Q. Good morning, Mr. Malackowski.

1:05:14 1 A. Good morning.

1:05:16 2 Q. Please state your name.

1:05:18 3 A. James Edward Malackowski.

1:05:21 4 Q. What is the address from which you
1:05:23 5 are appearing today?

1:05:25 [REDACTED]

1:05:30 [REDACTED]

1:05:35 8 Q. You have been deposed many times
1:05:36 9 before; correct?

1:05:38 10 A. Yes, ma'am.

1:05:40 11 Q. Since the 10X Bio-Rad trial in
1:05:43 12 Delaware 152 case, have you testified at trial?

1:05:53 13 A. Actually, would have to give that
1:05:55 14 some thought. Nothing immediately comes to mind
1:05:57 15 largely because of the pandemic, but I suppose there
1:06:01 16 will be at least one or two matters because I have
1:06:04 17 given at least one video -- trial by video and at
1:06:09 18 least one trial in person during the pandemic. So
1:06:13 19 the ones that I recall were by video, Centripetal
1:06:19 20 versus Cisco, and in-person, Security Point versus
1:06:29 21 the TSA.

1:06:33 22 I don't recall others though. They
1:06:34 23 would all be listed on my CV.

1:06:38 24 Q. Did you appear as an expert for
1:06:40 25 plaintiffs in those two cases?

1:06:45 1 A. Yes.

1:06:49 2 Q. You've had a chance to prepare with
1:06:50 3 counsel before your deposition today; correct?

1:06:54 4 A. Yes, ma'am.

1:06:56 5 Q. Was anyone else present aside from
1:06:59 6 counsel during your deposition presentation?

1:07:01 7 A. Yes, ma'am. Two of my colleagues
1:07:02 8 from Ocean Tomo, a Mr. Hess and Mr. Clemons.

1:07:06 9 Q. Anyone else?

1:07:07 10 A. No, ma'am.

1:07:11 11 Q. Is there any reason why you couldn't
1:07:12 12 give your best and most truthful testimony today?

1:07:19 13 A. I don't believe so, no, ma'am.

1:07:20 14 Q. Is it correct that you were retained
1:07:22 15 by counsel for Bio-Rad in this case to offer
1:07:25 16 opinions on damages?

1:07:30 17 A. Specifically Ocean Tomo was retained
1:07:32 18 by counsel for plaintiffs to offer opinions largely
1:07:35 19 related and focused on damages, yes.

1:07:40 20 Q. Are you retained by counsel for
1:07:42 21 Bio-Rad only or by counsel for Bio-Rad and Harvard?

1:07:58 22 A. As described on page five of my
1:08:00 23 report, Ocean Tomo was retained by counsel for
1:08:04 24 Bio-Rad Laboratories and the President and Fellows
1:08:05 25 of Harvard College collectively.

1:08:12 1 Q. Do you recall when you were first
1:08:13 2 retained by counsel for plaintiffs to offer opinions
1:08:19 3 in this particular case, the Massachusetts 10X
1:08:23 4 Bio-Rad matter?

1:08:25 5 A. I believe it was the summer of last
1:08:27 6 year, approximately June.

1:08:39 7 Q. You have prepared an expert report
1:08:40 8 containing your opinions and the bases for those
1:08:43 9 opinions relating to the amount of damages 10X would
1:08:47 10 owe should Bio-Rad prove that 10X infringes
1:08:47 11 Bio-Rad's asserted patent; correct?

1:08:51 12 A. More specifically, I prepared two
1:08:53 13 expert reports, an initial report that was produced
1:08:58 14 in February, on the 5th of February of this year,
1:09:01 15 and a recent supplemental report that was produced I
1:09:06 16 believe last week.

1:09:13 17 MS. HADZIMEHMEDOVIC: Ashley, if we
1:09:14 18 could please mark exhibit one and show it on the
1:09:30 19 screen for the witness.

1:09:35 20 (Whereupon, document entitled Expert
1:09:35 21 Report of James E. Malackowski, February 5, 2021, is
1:09:35 22 received and marked as Exhibit 1 for
1:09:35 23 Identification.)

1:09:36 24 BY MS. HADZIMEHMEDOVIC:

1:09:37 25 Q. Mr. Malackowski, we have exhibit one,

1:44:21 1 matters which involve trade secrets. In trade
1:44:25 2 secret cases, the burden for the plaintiffs in
1:44:29 3 assessing damages is relatively light. Essentially
1:44:33 4 they need only prove the revenues of the defendant,
1:44:35 5 and the burden of the defendant is quite high. They
1:44:38 6 have to show any deduction from revenues for
1:44:42 7 profitability, as well as any apportionment from
1:44:46 8 those profits to the trade secrets at issue, and
1:44:51 9 those matters can become very, very detailed and
1:44:55 10 involved and time-consuming, and I've worked, it
1:44:58 11 seems, like on a number of them in the past three
1:45:02 12 years.

1:45:15 13 Q. Is it your experience that you
1:45:18 14 roughly spend the same amount of hours if the
1:45:23 15 matters are roughly the same, whether you're a
1:45:29 16 defense or a plaintiff's expert in a patent case?

1:45:34 17 A. The number of hours in a patent case
1:45:37 18 is really not impacted by whether you're
1:45:40 19 representing the plaintiff or the defendant. The
1:45:42 20 number of hours in any given case is impacted more
1:45:45 21 directly by the number of patents that are at issue
1:45:48 22 in the case, the financial amount at risk, the
1:45:55 23 extent of discovery.

1:46:03 24 Q. In the reasonable royalty analysis in
1:46:05 25 this case, one of the approaches that you have used

1:46:09 1 is the so-called market approach; correct?

1:46:13 2 A. I've considered the market approach
1:46:15 3 as a quantitative indicator for the Georgia-Pacific
1:46:20 4 analysis, that's true.

1:46:22 5 Q. Would you please turn to page 71 of
1:46:23 6 your report?

1:46:36 7 A. Yes, I have it.

1:46:37 8 Q. And if you would turn to the first
1:46:39 9 bullet. Is it fair to say that this first bullet on
1:46:49 10 page 71 of exhibit one includes a summary of the
1:46:54 11 result of your market approach analysis?

1:46:58 12 A. At a high level, I think that is
1:46:59 13 fair.

1:47:04 14 Q. It lists in the three separate
1:47:06 15 bullets the licenses you considered in the market
1:47:11 16 approach; correct?

1:47:13 17 A. Yes, ma'am.

1:47:15 18 Q. The first bullet lists
1:47:16 19 Caliper/RainDance, then Applied Biosystem/QuantaLife
1:47:22 20 license, and the Applera/Bio-Rad license; correct?

1:47:27 21 A. Yes, and just to clarify, this is
1:47:29 22 more appropriately described as a list of the
1:47:31 23 licenses that I relied upon or focused on. There
1:47:34 24 are other licenses that I have considered that are
1:47:36 25 not contained within these bullets because they were

1:47:39 1 deemed to be not comparable or relevant.

1:47:45 2 Q. The second bullet lists the
1:47:48 3 MRC/RainDance license and the Harvard/RainDance
1:47:51 4 license that you relied upon; correct?

1:47:56 5 A. Yes, ma'am.

1:47:56 6 Q. And the third and last bullet lists
1:47:58 7 the [REDACTED] license that you relied upon in your
1:48:01 8 market approach; correct?

1:48:04 9 A. Yes, ma'am.

1:48:07 10 Q. The stated rates for the licenses you
1:48:11 11 relied upon in the market approach are as low as
1:48:14 12 1 percent; correct?

1:48:18 13 A. I believe that's true, though we
1:48:19 14 would have to refer back to each agreement because
1:48:20 15 they do vary.

1:48:24 16 Q. And the highest stated royalty rate
1:48:26 17 in those agreements was 15 percent; correct?

1:48:31 18 A. Yes, I believe that is true.

1:48:37 19 Q. Based on your interpretation of the
1:48:39 20 licenses that you relied upon for the market
1:48:41 21 approach, you determined that the range is 4 percent
1:48:48 22 to 15 percent; correct?

1:48:52 23 A. Yes. Let me go back though and
1:48:55 24 correct my last answer. I believe one of the
1:48:57 25 agreements through an amendment has a stated rate of

1:50:48 1 page 34 of my report and it's actually
1:50:50 2 15.75 percent.

1:50:57 3 Q. You're speaking about the amendment
1:51:02 4 to the Applera/Bio-Rad license; correct?

1:51:08 5 A. Yes, ma'am.

1:51:11 6 Q. You did not rely upon that rate in
1:51:19 7 your opinions in this case; is that fair?

1:51:21 8 A. Yes, ma'am.

1:51:28 9 Q. The market approach was an input that
1:51:32 10 you used and then you apply the Georgia-Pacific
1:51:37 11 factors as a qualitative assessment with the
1:51:40 12 starting point from the market approach?

1:51:48 13 A. If that's a question, I would answer
1:51:49 14 yes, that's what I did.

1:51:54 15 Q. You concluded that 10X and Bio-Rad
1:51:57 16 would agree to the high end of your market approach
1:52:01 17 determined rates; correct?

1:52:04 18 A. Well, more specifically as described
1:52:05 19 within my report, I concluded they would agree to a
1:52:09 20 rate above the high end of the market approach, but
1:52:12 21 to be conservative, I have capped the royalty at the
1:52:16 22 15 percent rate.

1:52:48 23 Q. You did also opine that as a result,
1:52:50 24 the hypothetical negotiation would result in a
1:52:52 25 reasonable royalty rate toward the high end of the

1:54:31 1 that was suitable for the facts of this case. Then
1:54:35 2 I applied the Georgia-Pacific criteria.

1:54:41 3 Q. The Georgia-Pacific factors provided
1:54:43 4 a qualitative adjustment to the market approach
1:54:48 5 conclusions; correct?

1:54:50 6 A. Generally speaking, yes.

1:54:52 7 Q. And it's fair to say that there is
1:54:53 8 really no explicit way to calculate the increment
1:55:00 9 provided through your Georgia-Pacific analysis to
1:55:04 10 the rate that you determined?

1:55:08 11 A. Well, there is no formula for
1:55:10 12 Georgia-Pacific, if that's what you're asking, as in
1:55:14 13 start with X and add 10 percent for one factor,
1:55:17 14 subtract 5 percent for another. That calculus does
1:55:22 15 not exist. In this case, because I'm conservatively
1:55:27 16 capping the royalty within the range founded by
1:55:31 17 market approach, the question really doesn't have
1:55:34 18 necessity because there is no change from that
1:55:36 19 initial starting point in order to be conservative.

1:55:50 20 (Stenographer clarification.)

1:55:53 21 MS. TU: Yeah. Jim, if you could
1:55:54 22 just wait a couple of seconds or just one second
1:55:57 23 would be great.

1:56:05 24 Yes, I did object to that question.

1:56:16 25 Q. You concluded that Bio-Rad and 10X

1:56:20 1 would agree in the hypothetical negotiation to the
1:56:23 2 highest stated rate in any of the agreements that
1:56:27 3 you have relied upon in this case; correct?

1:56:34 4 MS. TU: Objection.

1:56:37 5 A. I have concluded they would agree to
1:56:40 6 a 15 percent rate, which is at the upper end of the
1:56:45 7 range that I relied upon, though lower than the
1:56:48 8 highest stated rate within the agreements considered
1:56:52 9 as we discussed.

1:57:03 10 Q. The question was about agreement
1:57:05 11 relied upon, so I'll repeat it.

1:57:07 12 You have concluded that Bio-Rad and
1:57:09 13 10X would agree in the hypothetical negotiation to
1:57:13 14 the highest stated rate in any of the agreements
1:57:18 15 that you have relied upon in this case; correct?

1:57:22 16 MS. TU: Objection.

1:57:25 17 A. So I'm not sure how that question is
1:57:27 18 different, and I don't want to give the impression
1:57:29 19 that the conclusion of the negotiation was the
1:57:32 20 highest possible rate. They weren't -- there wasn't
1:57:36 21 a conclusion saying, Let's first agree to what would
1:57:39 22 be highest, then let's figure out what that is.

1:57:41 23 The conclusion was a 15 percent rate
1:57:44 24 conservatively determined, but consistent with the
1:57:49 25 upper bound of the range of the agreements I relied

1:57:53 1 upon.

1:58:00 2 Q. The rate that you concluded, the
1:58:02 3 15 percent rate that you opined Bio-Rad and 10X
1:58:06 4 would agree to in the hypothetical negotiation is,
1:58:10 5 indeed, the highest stated rate in any of the
1:58:14 6 agreements that you have relied upon in this case;
1:58:16 7 correct?

1:58:19 8 MS. TU: Objection.

1:58:21 9 A. Arithmetically speaking, it is equal
1:58:23 10 to the upper bound, that's true.

1:58:29 11 Q. You agree that the textbooks approach
1:58:32 12 on the market analysis teaches that -- strike that.

1:58:38 13 You would agree that the textbook
1:58:41 14 approach on the market analysis approach teaches
1:58:43 15 that any market approach analysis would likely
1:58:48 16 require reasonable adjustments?

1:58:54 17 MS. TU: Objection.

1:58:56 18 A. I am not averse to that sentence. I
1:59:00 19 don't know if you're reading from my report or a
1:59:01 20 textbook, but in most cases there would be
1:59:05 21 reasonable adjustment, and, indeed, in this case, I
1:59:11 22 believe one could apply a reasonable adjustment to
1:59:16 23 reach a conclusion that exceeds the bounds of the
1:59:20 24 existing agreements, meaning a royalty determination
1:59:23 25 in excess of 15 percent. I have not done that.

1:59:30 1 Q. One of your adjustments was to adjust
1:59:32 2 the rates of Harvard/RainDance and MRC/RainDance
1:59:36 3 licenses; correct?

1:59:43 4 A. Within my report, I do show
1:59:44 5 adjustments to those rates to facilitate
1:59:48 6 comparability to the other agreements. That is
1:59:49 7 true.

1:59:50 8 Q. You adjust the rates of those two
1:59:52 9 licenses, Harvard/RainDance and MRC/RainDance,
1:59:54 10 upward by doubling them; correct?

1:59:59 11 MS. TU: Objection.

2:00:01 12 A. I adjust them upward arithmetically
2:00:04 13 using a doubling factor based on the LES research
2:00:08 14 that I cite in my report and my general experience
2:00:13 15 on such an adjustment.

2:00:15 16 Q. And your opinion is that even after
2:00:19 17 doubling the stated rates of the Harvard/RainDance
2:00:22 18 and the MRC/RainDance license, those rates doubled
2:00:27 19 are still just the floor on your analysis; correct?

2:00:31 20 MS. TU: Objection.

2:00:37 21 A. Well, my report will describe them
2:00:39 22 specifically, but I believe that those rates, even
2:00:40 23 after adjustment, are not as economically comparable
2:00:44 24 to the other agreements that I rely upon, and so if
2:00:46 25 they were to be used or considered at all, they

2:00:49 1 would have to be considered as the floor.

2:00:52 2 Q. These two licenses, Harvard/RainDance
2:00:55 3 and the MRC/RainDance license, you would agree with
2:00:59 4 me are the most technologically comparable licenses
2:01:03 5 in the record; correct?

2:01:04 6 MS. TU: Objection.

2:01:07 7 A. I think that's really a better
2:01:08 8 question for Dr. Gale. I do recognize that these
2:01:12 9 agreements include the prior patent filings that
2:01:18 10 ultimately matured to the two patents-in-suit. So
2:01:23 11 that makes them technically comparable generally
2:01:26 12 speaking and I recognize that. I don't draw an
2:01:30 13 opinion as to whether, therefore, that makes them
2:01:32 14 more technically comparable.

2:01:35 15 I would limit such a qualitative
2:01:39 16 ranking of agreements to ones that only included the
2:01:43 17 patents-in-suit.

2:01:49 18 Q. Mr. Malackowski, if you could please
2:01:50 19 turn to page 48 of exhibit one. Your February 5
2:01:56 20 report.

2:02:02 21 A. Yes, ma'am.

2:02:03 22 Q. Section 12.1.7.

2:02:07 23 A. Yes, ma'am.

2:02:08 24 Q. And look at the very last sentence
2:02:13 25 starting -- paragraph starting with "however," which

2:02:16 1 is a single sentence.

2:02:18 2 A. Yes, ma'am.

2:02:19 3 Q. If you could read that and let me
2:02:20 4 know when you're done.

2:02:22 5 A. I have. I would simply note the
2:02:29 6 ending phrase of, quote, in the record. Whereas,
2:02:31 7 your questions were speaking in the absolute sense.
2:02:35 8 So I certainly stand by my prior answer, as well as
2:02:37 9 the language within this report.

2:02:40 10 Q. Well, we could reread my question,
2:02:43 11 but I'll ask it again.

2:02:49 12 Those two licenses, Harvard/RainDance
2:02:52 13 and MRC/RainDance, are the two licenses that are the
2:02:58 14 most technically comparable licenses in the record;
2:03:01 15 correct?

2:03:04 16 A. Well, not on their face. Again, the
2:03:07 17 paragraph that you cite caveats that by saying
2:03:09 18 "along with certain quantitative adjustments." So
2:03:14 19 with quantitative adjustments, limiting it to what's
2:03:19 20 in the record, then they would be the most
2:03:21 21 technically comparable. In an absolute sense, just
2:03:24 22 from a licensing theory standpoint, the most
2:03:26 23 technically comparable agreements would be ones that
2:03:28 24 only address the patents-in-suit.

2:03:36 25 Q. Are you standing by the clause in

2:03:37 1 this sentence that says: Therefore, the most
2:03:41 2 technically comparable licenses in the record?

2:03:50 3 A. Yes, in the context of the entire
2:03:51 4 sentence.

2:04:02 5 Q. The reason they are the most
2:04:04 6 technically comparable licenses in the record is as
2:04:05 7 you said, because they include the rights to the two
2:04:09 8 patents-in-suit here, the '444 and '277; correct?

2:04:14 9 A. That is the reason why I draw the
2:04:17 10 conclusion that I do in the paragraph that you cite,
2:04:21 11 that's true, because of that lineage.

2:04:33 12 Q. Just for ease of reference, we can go
2:04:35 13 back to page 71 of exhibit one. The stated rates in
2:04:48 14 the Applied Biosystems/QuantaLife license are in the
2:04:52 15 range of 10 percent to 15 percent; correct?

2:05:11 16 A. That is correct. Defer to my report
2:05:13 17 that describes that range in detail, but I believe
2:05:16 18 that's right.

2:05:17 19 Q. You adjust that 10 to 15 percent rate
2:05:21 20 to 15 percent royalty rate; correct?

2:05:51 21 A. My conclusion with respect to the
2:05:53 22 Applied Biosystems/QuantaLife license as shown on
2:05:56 23 page 32 is, quote: Indicative of a reasonable
2:06:01 24 royalty rate in this case of between 10 percent and
2:06:04 25 15 percent of net sales, end quote.

2:06:07 1 So there is no specific adjustment of
2:06:09 2 that agreement to the high end or the low end of
2:06:13 3 that range.

2:06:24 4 Q. The Caliper/RainDance license
2:06:26 5 included a -- sorry. Strike that.

2:06:28 6 The Caliper/RainDance license
2:06:30 7 included a 2 percent royalty rate and a 15 percent
2:06:35 8 royalty rate; correct?

2:06:39 9 A. Yes. Largely driven upon whether or
2:06:42 10 not the products at issue would be considered
2:06:45 11 competitive.

2:06:47 12 Q. 15 percent rate applied to chips and
2:06:50 13 reagents, but not instruments?

2:06:56 14 A. That is my general recollection, yes.

2:07:00 15 Q. When applying the royalty rate in the
2:07:04 16 hypothetical negotiation to 10X's products, you
2:07:08 17 include not only chips and reagents, but instruments
2:07:11 18 as well; correct?

2:07:14 19 A. Yes, I understand that the
2:07:17 20 instruments are also accused of infringing.

2:07:20 21 Q. But not only are they accused of
2:07:22 22 infringing, you specifically include them in the
2:07:24 23 royalty base; correct?

2:07:28 24 A. Yes, ma'am.

2:07:31 25 Q. RainDance never paid the 15 percent

2:09:13 1 regarding the agreement, but you are correct, that
2:09:17 2 as far as the basis of the royalty rates that I
2:09:22 3 extract from the agreement, it's from the 2009
2:09:24 4 agreement itself.

2:09:29 5 Q. You were not aware, were you, that
2:09:32 6 RainDance, in fact, considered this license to be
2:09:36 7 one where it had a 1 percent to 2 percent royalty
2:09:41 8 rate obligation; correct?

2:09:46 9 MS. TU: Objection.

2:09:48 10 A. I believe you're referring to
2:09:52 11 correspondence regarding the license. Obviously, I
2:09:55 12 do recognize that there are other payments that are
2:10:08 13 provided in the license, such as a 2 percent royalty
2:10:12 14 for nonscreening applications. There are other fees
2:10:17 15 within the license that are stated milestone
2:10:21 16 payments less than 2 percent.

2:10:34 17 Q. RainDance's internal documents
2:10:36 18 produced in this case, aside from the 2009 agreement
2:10:44 19 itself, do not reference the 15 percent rate; is
2:10:49 20 that right?

2:10:52 21 MS. TU: Objection.

2:10:53 22 A. I could not speculate as to what all
2:10:57 23 of the other documents may or may not reference. I
2:11:03 24 would suspect that within the total population of
2:11:07 25 trade negotiation documents are draft licenses. I

2:37:40 1 opinion regarding the royalties 10X owes on two
2:37:43 2 patents-in-suit, the '444 and '277 patent; correct?

2:37:49 3 A. Yes, ma'am.

2:37:52 4 Q. You do not offer any opinion on
2:37:55 5 frequency of use of the claimed inventions in the
2:37:58 6 two asserted patents; correct?

2:38:04 7 A. Correct, not as I understand your
2:38:05 8 question. So the royalty base is revenues, not some
2:38:09 9 other use base metric and, therefore, there is no
2:38:13 10 such analysis in my report.

2:38:18 11 Q. You also do not have an understanding
2:38:24 12 of whether the claims of the '444 and '277 patent
2:38:30 13 are or are not limited in a sense that only a subset
2:38:34 14 of droplets generated by means of 10X's chips as
2:38:39 15 opposed to all of the droplets generated are
2:38:43 16 practicing the claimed inventions?

2:38:46 17 MS. TU: Objection.

2:38:50 18 A. So that is a better question for the
2:38:52 19 technical expert, which addresses each claim element
2:38:56 20 against the products in suit. I don't draw an
2:38:59 21 opinion that it is necessarily every droplet that
2:39:04 22 falls within the specific claims, but that generally
2:39:07 23 speaking, the patents-in-suit address the intended
2:39:12 24 purpose and functionality of the products at issue.

2:39:23 25 Q. Assuming that the benefit of the

2:39:25 1 claimed inventions in the '444 and '277 applies only
2:39:30 2 to the subset of droplets and not all, you have not
2:39:34 3 made an adjustment to assess that possibility;
2:39:39 4 correct?

2:39:43 5 A. Well, I understand that is a
2:39:44 6 possibility. I talk within my report about how in
2:39:48 7 this industry companies use revenues to facilitate
2:39:53 8 accounting and that is considered within the license
2:39:58 9 agreements that I rely upon, and barring any
2:40:02 10 evidence to suggest that it would be a substantial
2:40:08 11 impact on the perceived benefits of negotiation, I
2:40:12 12 have not made a further adjustment to account for
2:40:17 13 the issue you raise.

2:40:31 14 Q. You take as the base the full price
2:40:34 15 of 10X's instruments, 10X's chips, and 10X's gel
2:40:39 16 bead and other reagents and apply the royalty rate
2:40:44 17 that you have determined; correct?

2:41:05 18 (Stenographer clarification.)

2:41:07 19 Q. I'm a little bit far from the mic so
2:41:08 20 that I can have my papers in front of me. So you
2:41:14 21 take as the royalty base the net revenue price of
2:41:23 22 10X's instruments, 10X's chips, and 10X's gel beads
2:41:30 23 and other reagents and apply the royalty rate that
2:41:34 24 you have determined to that royalty base; correct?

2:41:39 25 A. Generally, yes, as I understand those

2:41:41 1 are the accused revenues.

2:41:48 2 Q. Is it correct that you have not been
2:41:49 3 asked to consider the damages on a patent-by-patent
2:41:52 4 basis?

2:41:56 5 A. That is true, though because of the
2:42:00 6 lineage of the patents-in-suit here, they generally
2:42:05 7 relate to similar functionality, and so I don't
2:42:08 8 believe the royalty would change if only a subset of
2:42:13 9 the asserted claims was found to infringe.

2:42:22 10 Q. Your opinion is that neither the
2:42:24 11 royalty base nor the royalty rate would change if
2:42:30 12 only a subset of the asserted claims were found to
2:42:33 13 infringe; is that correct?

2:42:39 14 A. More specifically, my opinion is the
2:42:41 15 royalty rate would not change, but to the extent
2:42:43 16 that there was a legal ruling that removed certain
2:42:48 17 claims from the accusations in this case and as a
2:42:52 18 result certain revenues were no longer considered
2:42:55 19 infringing, then I would remove the noninfringing
2:43:00 20 revenues from my analysis.

2:43:08 21 Q. But your opinions in this case
2:43:09 22 presently do not provide that contingent analysis;
2:43:13 23 correct? You have not said if this claim is out of
2:43:19 24 the case, then my base is reduced by this amount; is
2:43:23 25 that fair?

2:43:26 1 A. It is fair in the sense that I'm not
2:43:28 2 aware of any data that would allow for that specific
2:43:32 3 base reduction. That said, in the spirit of
2:43:35 4 disclosure, I recognize that Ms. Davis does make
2:43:42 5 certain deductions to the royalty base for legal or
2:43:45 6 apportionment reasons, and I do not dispute her
2:43:50 7 deductions. So I would anticipate revising the
2:43:54 8 royalty base in my analysis to conform with hers.

2:44:16 9 Q. How do you anticipate revising your
2:44:17 10 royalty base to conform with Ms. Davis' analysis?
2:44:23 11 Are you anticipating a supplement to your report?

2:44:30 12 A. I have not discussed with counsel
2:44:31 13 whether a supplement would be necessary as
2:44:34 14 essentially it's simple math utilizing the royalty
2:44:38 15 base in the Ms. Davis report and simply multiplying
2:44:42 16 by the 15 percent royalty that I opined to.

2:45:01 17 Q. I'm looking at the rough transcript,
2:45:02 18 so I just want to make sure that I understand what
2:45:06 19 you've said. You said: I recognize that Ms. Davis
2:45:10 20 does make certain deductions to the royalty base for
2:45:13 21 legal and apportionment reasons and I do not dispute
2:45:18 22 other deductions.

2:45:20 23 Did you say that you do not dispute
2:45:21 24 her deductions?

2:45:23 25 A. Yes.

2:45:27 1 Q. So you are agreeing with all of the
2:45:30 2 deductions that Ms. Davis made to the royalty base;
2:45:37 3 is that fair?

2:45:39 4 A. More specifically, I would say I am
2:45:41 5 accepting her deductions. Many of them are for
2:45:45 6 legal reasons, which are outside the scope of my
2:45:50 7 testimony, but in an effort to both remove
2:45:55 8 unnecessary dispute and to focus on the real issue,
2:45:59 9 which is the royalty rate, I believe Ms. Davis and I
2:46:03 10 will present the same royalty base to the jury.

2:46:43 11 Q. You may say I've asked you the
2:46:44 12 question, but I really haven't asked it this
2:46:47 13 particular way, so bear with me.

2:46:51 14 Your opinion is the same whether 10X
2:46:56 15 infringes only the '444 patent, only the '277 patent
2:47:02 16 or both '444 and '277 patents; correct?

2:47:06 17 A. The royalty rate is the same. To the
2:47:09 18 extent there would be legal reasons to adjust the
2:47:11 19 base, I would certainly take that into account. I'm
2:47:14 20 not aware of any such distinction.

2:47:29 21 Q. If one of the patents drops out, your
2:47:32 22 opinion regarding the amount of damages does not
2:47:37 23 change; correct?

2:47:42 24 A. To stick with my prior response,
2:47:43 25 barring any change in asserted infringing revenue,

2:47:48 1 the total would not change.

2:47:52 2 Q. Your opinion is that the value is the
2:47:54 3 same when Bio-Rad is seeking royalties on 14 claims
2:48:01 4 of two patents and when Bio-Rad may be seeking
2:48:05 5 royalties on a single asserted claim of a single
2:48:08 6 patent; is that fair?

2:48:11 7 A. Arithmetically, it is the same
2:48:13 8 answer, but it is because in part of industry
2:48:18 9 experience and the examples I'm relying upon, where
2:48:22 10 there are comparable agreements with multiple patent
2:48:24 11 rights, where the amount that's due under the
2:48:27 12 agreement does not bury if one or more of the
2:48:31 13 patents in many cases were found to later be invalid
2:48:34 14 or not utilized.

2:48:56 15 Q. You have not segregated or identified
2:48:58 16 a particular value associated with any particular
2:49:03 17 single asserted claim; is that right?

2:49:07 18 A. I have not specifically identified or
2:49:10 19 make a distinguishing calculation by claim as
2:49:14 20 distinct from the collection of asserted claims and
2:49:17 21 the assumption that the patents are valid and
2:49:20 22 infringed.

2:49:24 23 Q. And although when assumed valid and
2:49:27 24 infringed, each claim is presumed to cover a
2:49:31 25 specific invention, you have not isolated the value

2:49:35 1 of any one specific claim; correct?

2:49:39 2 A. Correct. Both for the assumption
2:49:43 3 that I describe, as well as industry practice
2:49:45 4 consistent with the agreements I rely upon.

2:49:48 5 Q. Would you please turn to page 15 of
2:49:50 6 exhibit one.

2:50:05 7 A. I have it.

2:50:06 8 Q. On page 15 of your report in exhibit
2:50:08 9 one, you list what you understood at the time to be
2:50:13 10 claims asserted against 10X in this case, '444 and
2:50:19 11 '277 patent; correct?

2:50:22 12 A. Yes, ma'am.

2:50:25 13 Q. And in opining in coming up with your
2:50:33 14 conclusions in this case, you assumed that the
2:50:38 15 claims one, two, four, eight and nine of '444 patent
2:50:43 16 were asserted and you assume that claims one to six,
2:50:46 17 eight, nine, 11, 13 and 14 of the '277 patent were
2:50:50 18 asserted; correct?

2:50:53 19 A. Yes, ma'am.

2:51:00 20 Q. Now, Dr. Gale did not offer any
2:51:08 21 opinions about 10X's infringement of claim nine of
2:51:13 22 '444 patent or claim 13 of '277 patent. Is that
2:51:18 23 your present understanding?

2:51:21 24 A. I don't recall from memory sitting
2:51:23 25 here such narrowing of Dr. Gale's report. I would

2:51:32 1 have to go back and understand or confirm if that's
2:51:36 2 the case, and then also I noted that Ms. Davis made
2:51:39 3 certain royalty based deductions for reasons related
2:51:43 4 to Dr. Gale's proof, and so I would also want to
2:51:50 5 confirm if these were coincident issues, meaning
2:51:53 6 that the claims you just identified form the basis
2:51:56 7 for Ms. Davis' asserted deductions, which I am not
2:52:00 8 disputing.

2:52:05 9 Q. If we could just for the purposes of
2:52:06 10 this examination assume that Ms. Davis' deductions
2:52:10 11 did not have anything to do with claim nine or claim
2:52:14 12 13 not being asserted in the case anymore. So
2:52:17 13 assume that for the moment, and assume that it is
2:52:21 14 correct that Bio-Rad is no longer asserting claim
2:52:24 15 nine of the '444 patent and claim '277 of the --
2:52:30 16 sorry, claim 13 of the '277 patent. With those
2:52:37 17 assumptions, is it still your opinion that the
2:52:41 18 amount of damages does not change by means of
2:52:49 19 Bio-Rad no longer asserting claims nine of the '444
2:52:53 20 patent and claim 13 of the '277 patent?

2:53:01 21 A. Yes, under those assumptions, for the
2:53:02 22 reasons I described, there would be no change in the
2:53:04 23 final damages.

2:53:11 24 Q. You are aware that claim one of the
2:53:14 25 '444 patent includes a detection step that is not

2:53:18 1 part of the claim one of the '277 patent?

2:53:25 2 A. I can see that as a distinguishing
2:53:28 3 characteristic of the two claims, yes, ma'am.

2:53:34 4 Q. It is your opinion though that the
2:53:36 5 value of claim one of the '444 patent is the same as
2:53:40 6 the value of the claim one of the '277 patent
2:53:44 7 despite the detection requirement of claim one of
2:53:49 8 the '444 patent not being a requirement in the claim
2:53:53 9 one of the '277 patent; correct?

2:53:57 10 A. No, I don't think that's fair because
2:54:00 11 I don't do a comparative claim-by-claim value
2:54:03 12 assessment. That was not my assignment. My
2:54:07 13 assignment was to determine the royalty that would
2:54:09 14 be appropriate if the patents are valid and if the
2:54:14 15 products infringe. Not a claim-by-claim
2:54:18 16 calculation.

2:54:20 17 Q. But isn't it fair to say that the
2:54:23 18 import of your analysis is that if there is a single
2:54:26 19 claim standing after trial, the amount of damages
2:54:31 20 you calculate is the same; correct?

2:54:36 21 MS. TU: Objection.

2:54:37 22 A. If that single claim addresses the
2:54:39 23 same set of products, then yes, all of those
2:54:43 24 products would be infringing. All of those products
2:54:48 25 would benefit from the claim.

1 foundational and two as improvements in the Stilla
2 case; correct?

3 A. Generally speaking, yes.

4 Q. That insight comes to you from the
5 technical experts in the Stilla case; correct?

6 A. It does, although I believe the legal
7 pleadings also make reference to the same
8 distinction.

9 Q. In the 10X case for the '444 patent,
10 Bio-Rad expert, Dr. Gale, opined that the '444
11 patent is an improvement over the foundational
12 intellectual property in this space?

13 A. Correct, and I believe that is
14 consistent with the treatment of the '444 patent in
15 the Stilla case, which is the one patent that
16 overlaps both matters.

17 Q. Now, Dr. Gale did opine -- strike
18 that.

19 Your understanding is that Dr. Gale
20 did opine that the '444 patent in our case is an
21 improvement over the foundational intellectual
22 property, but he did not identify in the 10X case
23 which foundational intellectual property he was
24 referring to; is that right?

25 A. From memory, I could not speak to

whether he provided an answer in deposition or his report to that question. I would defer to him. That distinction is not necessary for my work.

Q. Is it your opinion that it is not necessary for you to understand what foundational intellectual property the '444 and '277 may have improved upon?

MS. TU: Objection.

A. As it relates to my work in the 10X case, which we're discussing today, Dr. Gale's specific reference to prior foundational technology for the '444 or the '277 does not impact my analysis because of the further work that he did where he was able to assess the relative contribution of the patents-in-suit to the benchmark agreements in the patents that were licensed there, and that's what I primarily rely upon from his work.

Q. Is it fair to say that it's really not the increment in value that the '444 and '277 provide over some foundational intellectual property that is critical to your analysis, but instead it is the assessment of the relative contributions of the patents-in-suit to 10X's products versus the benchmark agreements where you have licensed products and licensed patents?

1 case to know if I specifically referenced that. I
2 would certainly stand by whatever I said in that
3 report or that testimony.

4 Q. It is correct, isn't it, that you
5 have not included a definition of the term
6 "improvement" as it applies to the '444 and '277
7 patents?

8 A. Correct. I don't believe I
9 specifically define that term. I use that language
10 in relaying what I understand the description of the
11 technology to be from the technical expert and the
12 other pleadings in the case.

13 Q. It is correct, isn't it, that you did
14 not opine that the '444 and '277 patents give 10X's
15 product -- products their essential marketability;
16 correct?

17 MS. TU: Objection.

18 A. I don't recall if my report uses
19 those words, but as it relates to their Next GEM
20 product, that would be consistent with my
21 understanding that these patents do provide them
22 with the technology needed for their marketability,
23 confirmed by Ms. Davis' opinion that she does not
24 know of an alternative solution.

25 Q. You did not state an opinion that the

01:21:24 1 deposition.

01:21:28 2 Q. You do -- well, maybe you don't
01:21:33 3 anymore. I have a question that may actually be
01:21:38 4 affected now by your agreeing to Ms. Davis' royalty
01:21:42 5 base. That's not a question.

01:21:45 6 A. I'm hoping that's an observation the
01:21:47 7 deposition will now be shorter.

01:21:53 8 Q. This is sort of off the record, on
01:21:55 9 the record, it was a pleasant surprise that we have
01:21:57 10 agreement on the royalty base so.

01:22:02 11 I'll move on to another topic. And
01:22:08 12 perhaps although I'm sure you have this memorized,
01:22:12 13 we can just go to page 25 of exhibit one.

01:22:23 14 A. I have it.

01:22:25 15 Q. I'm sorry. That's the wrong page.
01:22:29 16 If we could go, please, to page 71, Georgia-Pacific
01:22:36 17 factor 15.

01:22:37 18 A. I have it.

01:22:49 19 Q. On page 71, you state the language of
01:22:54 20 the factor 15 of the Georgia-Pacific analysis;
01:22:58 21 correct?

01:23:00 22 A. I do.

01:23:02 23 Q. And this really sets forth that the
01:23:09 24 hypothetical negotiators are negotiating over an
01:23:12 25 amount that the licensor, who is willing, would

1 Identification.)

01:24:44 2 BY MS. HADZIMEHMEDOVIC:

01:24:58 3 Q. Mr. Malackowski, do you see exhibit
01:24:59 4 two on the screen?

01:25:01 5 A. Yes, it looks like a copy of the
01:25:03 6 original Georgia-Pacific versus U.S. Plywood case
01:25:07 7 from the 1970s.

01:25:11 8 Q. And this is the seminal case that
01:25:14 9 actually did set forth the 15 Georgia-Pacific
01:25:16 10 factors that you apply in your analysis; correct?

01:25:21 11 A. Yes, ma'am.

01:25:24 12 MS. HADZIMEHMEDOVIC: Ashley, can we
01:25:25 13 please turn to PDF page seven?

01:25:39 14 Q. Mr. Malackowski, do you see that on
01:25:40 15 that page, we have a paragraph that is citing a case
01:25:48 16 and it states the following: In fixing damages on a
01:25:51 17 royalty basis against an infringer, the sum allowed
01:25:55 18 should be reasonable and that which would be
01:25:58 19 accepted by a prudent licensee who wished to obtain
01:26:01 20 a license, but was not so compelled, and a prudent
01:26:05 21 patentee who wished to grant a license, but was not
01:26:08 22 so compelled.

01:26:10 23 Do you see that?

01:26:11 24 A. I do.

01:26:13 25 Q. Is this a principle that you have

1 applied in your analysis?

2 A. Well, the language that you cite is
3 by admission of this case one of several different
4 phrasing that set forth a more general tool, which
5 is described starting at head note six.

6 So I don't disagree that some cases
7 have used that language, but I don't think that
8 language is used in every case.

9 Q. In your implication of the
10 Georgia-Pacific analysis, are you placing the
11 licensee under compulsion to take a license?

12 A. I don't use the word "compulsion."
13 So I would say no. I don't say they are compelled.
14 The only time that word would have meaning to me is
15 if it was some sort of a holdup license where you
16 were compelling someone to take a license at a time
17 that was economically irrational for them or you
18 imputed a royalty that reflected more than the
19 footprint to the invention, and I'm not doing that.

20 Q. So you do agree that, A,
21 Georgia-Pacific analysis does not allow the concept
22 of the licensee in the hypothetical negotiation
23 being under compulsion and it also does not allow
24 you to apply a holdup value in the hypothetical
25 negotiation. Both of those are correct; true?

01:28:04 1 MS. TU: Objection.

01:28:06 2 A. I need to review this case and the
01:28:09 3 language around it to answer that question. So
01:28:11 4 maybe you can just give me a minute.

01:28:24 5 Q. I don't mind giving you a minute. I
01:28:26 6 am asking about your understanding you applied when
01:28:29 7 you wrote your report.

01:28:31 8 A. But you're using this term
01:28:32 9 "compulsion," which you're bring forward from this
01:28:37 10 case which by its face talks about variant uses of
01:28:40 11 the phrase. So I just want to make sure I'm using
01:28:44 12 it in a way that's consistent with the genesis of
01:28:47 13 your question.

01:28:50 14 Q. How do you understand the word
01:28:51 15 "compulsion"?

01:28:53 16 A. I don't use the word "compulsion" in
01:28:55 17 my analysis. The way I would understand it would be
01:29:04 18 similar to a holdup license, as I described for you
01:29:06 19 before, which would be a negotiation that extracted
01:29:08 20 a payment greater than would be justified by the
01:29:13 21 footprint of the invention, and I'm not doing that
01:29:19 22 here, so to that extent, I'm not assuming anyone's
01:29:24 23 under some compulsion.

01:29:31 24 Q. Is it your understanding too that the
01:29:33 25 hypothetical negotiators are not negotiating under a

1 then taking advantage of the discounts, but
2 regardless, I would have to go back to the records
3 to match the payments to the terms. That was not
4 necessary for my work.

5 Q. You don't disagree that there are
6 records in this case that show RainDance and later
7 Bio-Rad paying half the stated rates in the Harvard
8 and MRC licenses and that is one-half percent for
9 chips and 1 percent for instruments?

10 MS. TU: Objection.

11 A. I don't offer those opinions in my
12 report. I can accept that for purposes of the
13 deposition today. Generally speaking, I do believe
14 that there were certain discounts available for
15 third-party royalties, and that Bio-Rad took
16 advantage of those when they were available, but
17 from memory, I couldn't tell you what the specifics
18 are. It's not relevant to the analysis.

19 Q. The reason that RainDance and later
20 Bio-Rad could have the stated rate is what's called
21 the stacking provision in Harvard/RainDance and the
22 stacking provision in the MRC/RainDance license. Is
23 that your understanding?

24 A. Yes, generally, that that is a reason
25 why a licensee would pay a discounted rate, and I

1 believe that both those agreements do contain what
2 you're referring to as a stacking provision.

3 Q. And a stacking provision is basically
4 where you have a paid -- where a licensee is paying
5 a licensor A and then can deduct a portion of the
6 royalties paid, usually about 50 percent against the
7 royalties that licensee is paying to licensor B; is
8 that fair?

9 A. Generally speaking, that's right.

10 Q. RainDance and then later on Bio-Rad
11 took advantage of the stacking provisions in both of
12 the agreements, in the agreement with Harvard and in
13 the agreement with MRC; correct?

14 MS. TU: Objection.

15 A. That's a question you asked me a
16 couple of times already. So I would refer you to my
17 last answer. I don't recall specifically without
18 mapping the payments to the agreement terms, but
19 generally speaking, I do believe that when
20 available, they did take advantage of stacking
21 discounts.

22 Q. And that was completely proper;
23 right? That's not having your cake and eating it
24 too; right?

25 A. I don't allege that it isn't proper.

1 The phrase "having your cake and eating it too"
2 harkens back to analysis that I did in the prior
3 case where I opine that adding a stacking provision
4 in the hypothetical, in addition to a stacking
5 provision in an ongoing agreement, is in my opinion
6 having your cake and eating it too. So I don't
7 think a stacking provision is appropriate for the
8 hypothetical.

9 Q. You do not think that Bio-Rad was
10 having its cake and eating it too when it applied a
11 stacking provision in one agreement, Harvard
12 agreement, and applied a stacking provision in
13 another agreement, MRC agreement; correct?

14 A. I don't draw --

15 MS. TU: Objection.

16 A. I don't draw or offer an opinion in
17 that regard.

18 Q. And, in fact, Bio-Rad applied
19 additional stacking provisions or took benefit of
20 additional stacking provisions on the same products
21 under different agreements, correct, in addition to
22 these two?

23 MS. TU: Objection.

24 A. I don't draw an opinion to that for
25 the reasons I described earlier. I would have to go

1 back and map in the records against the terms.

2 Q. Now, for your comparable analysis,
3 you relied upon six agreements; correct? I'll ask a
4 more specific question.

5 In the comparable market approach
6 analysis you performed in this case, you
7 specifically relied upon six agreements?

8 A. I specifically relied upon in
9 Georgia-Pacific 15 the six agreements we talked
10 about earlier that are identified on page 71 of my
11 report.

12 Q. And it is true, isn't it, that five
13 of those six agreements includes stacking
14 provisions?

15 A. I believe so, but I would go back to
16 confirm.

17 Q. Bio-Rad's droplet products are the
18 Droplet Digital PCR or ddPCR products and the ddSEQ
19 product; right?

20 A. Yes, ma'am.

21 Q. With respect to its droplet products,
22 Bio-Rad or RainDance has never paid a 15 percent
23 royalty rate; correct?

24 A. I believe that's correct.

25 Q. The highest royalty rate paid to any

1:48:26 1 A. I haven't made that calculation. I
1:48:27 2 would have to go back and consider both the stated
1:48:29 3 rates, as well as the other elements of
1:48:32 4 consideration, and then even still I don't think
1:48:37 5 that would necessarily be relevant to my analysis in
1:48:39 6 this case.

1:48:42 7 Q. Bio-Rad did not pay royalties under
1:48:44 8 the Applera license for its droplet products ddPCR
1:48:49 9 or ddSEQ; correct?

1:48:53 10 A. It did not pay the competitive rate
1:48:57 11 of 15 percent. We've talked about that earlier.

1:49:01 12 Q. It didn't pay any royalties under the
1:49:03 13 Applera license for the ddSEQ and ddPCR; correct?

1:49:09 14 A. I believe that's true, though there
1:49:13 15 were certain upfront payments that were later made
1:49:16 16 in the amendment, so we would have to take that into
1:49:18 17 account, and other terms within the agreement, but I
1:49:21 18 don't believe there were running royalty payments.

1:49:26 19 Q. I want to make sure that we're on the
1:49:28 20 same page. I'm speaking about the Applera realtime
1:49:31 21 instrument license. Do you recall that as being one
1:49:35 22 of the three licenses that you rely upon that has
1:49:41 23 the stated rate of 15 percent?

1:49:50 24 A. It does, but it also has a
1:49:53 25 nonrefundable upfront fee of \$7 million not credited

1 against royalties and an additional \$3 million not
2 credited related to back royalties. So here again,
3 there are other terms in addition to the stated
4 rate, and this is the agreement that was later
5 amended increasing the stated rate and adding
6 another 5 million-dollar license fee.

7 Q. The licensed product under the
8 realtime instrument license were realtime thermal
9 cyclers; correct?

10 A. It was specific to having or making
11 and selling realtime thermal cyclers, yes.

12 Q. Bio-Rad's droplets product, such as
13 the ddPCR and ddSEQ, are not realtime thermal
14 cyclers; correct?

15 A. That is my understanding.

16 Q. So back to the question: Bio-Rad did
17 not pay royalties under the Applera realtime
18 instrument license for its ddPCR or ddSEQ products?

19 MS. TU: Objection.

20 A. I would have to go back to the
21 agreement to read the specific terms. In the
22 amendment, for example, it does expand the field of
23 use. I would need to confirm that that didn't
24 include products that you just cited. I don't
25 specifically in my report cite to payments on the

1 droplet products.

2 Q. And it's also true, isn't it, that
3 Bio-Rad did not pay royalties for its ddSEQ product
4 under the Applied Biosystems/QuantaLife license you
5 rely upon?

6 MS. TU: Objection.

7 A. I believe the Applied
8 Biosystems/QuantaLife license was not focused on
9 equipment, but rather consumables.

10 Q. DdSEQ includes equipment and
11 consumables; correct?

12 A. It does.

13 Q. So Bio-Rad did not pay royalties on
14 ddSEQ instruments or consumables under its Applied
15 Biosystems/QuantaLife license?

16 A. I don't cite that they do in my
17 report, though I would want to go back to the actual
18 agreement to confirm the scope of licensed products.

19 Q. Sitting here today, there is no
20 information in your report suggesting that Bio-Rad
21 ever paid license fees under the ABI/QuantaLife
22 license for its DD -- sorry, ddSEQ products?

23 A. I believe that's correct. I don't
24 state such in my report.

25 Q. And you also know that Bio-Rad did

13:02:51 1 Q. We spoke earlier about the licenses
13:02:54 2 that you determined in your opinion are most
13:02:58 3 comparable in this case, those being the
13:03:02 4 Applera/Bio-Rad agreement, Caliper/RainDance
13:03:05 5 agreement, and the Applied Biosystems/QuantaLife
13:03:08 6 agreement; correct?

13:03:10 7 A. Yes, we did speak about those at some
13:03:12 8 length.

13:03:23 9 Q. As to the Applera/Bio-Rad license,
13:03:25 10 you found that this agreement was indicative of a
13:03:28 11 reasonable royalty rate in this case in excess of
13:03:30 12 15 percent of net sales; correct?

13:03:36 13 A. From memory, that seems to be an
13:03:38 14 exact quotation from my report. I'm happy to turn
13:03:41 15 to that section and confirm if that language is
13:03:45 16 critical to you, but I think that's generally
13:03:47 17 correct.

13:04:10 18 Q. Would you agree that Bio-Rad's
13:04:11 19 Droplet Digital PCR product does not compete at all
13:04:15 20 with 10X's 10X Genomics products that are accused in
13:04:21 21 this case? I'll reask it.

13:04:27 22 You agree, don't you, that Bio-Rad's
13:04:32 23 ddPCR product do not compete with 10X's accused
13:04:35 24 products in this case?

13:04:37 25 MS. TU: Objection.

Q. You have not considered 10X's citation to specific evidence that 10X believes was fraudulently offered to the jury?

MS. TU: Objection.

A. No, I have not.

Q. Bio-Rad -- strike that.

The asserted '444/'277 patents do not claim any instrumentation for thermal cycling; do they?

A. So that's a general question that would require review of the patents themselves, claims, and the specification that describes them and is really a technical question. So I would defer first to Dr. Gale to respond on that. I don't draw opinions in that regard in my report.

Q. You did not take as an assumption in your analysis that the '277 and '444 patents claim thermal cyclers instrumentation?

A. I offer no opinion on that issue either way.

Q. You relied on Dr. Gale's report regarding the comparability between one of the licensed patents in the Applera license, the Haguchi patent, with the '444 and '277 patents; is that right?

03:13:34 1 A. My recollection is that he does call
03:13:36 2 out specific patents when making that comparison and
03:13:39 3 I do rely upon his work in that regard, yes.

03:13:43 4 Q. You also relied on Dr. Gale's review
03:13:45 5 of the thermal cyclers that were licensed in the
03:13:50 6 Applera license in its comparison with 10X's
03:13:57 7 products; correct?

03:13:57 8 A. I do rely upon Dr. Gale's assessment
03:14:03 9 of product comparisons. I from memory believe that
03:14:09 10 it is as you describe, though I wouldn't want to
03:14:12 11 speculate without a review of his report as to the
03:14:16 12 specific products that he used to support his
03:14:19 13 opinions.

03:14:21 14 Q. Now, separate from Dr. Gale's input
03:14:24 15 on this case, is it correct that as a licensing
03:14:31 16 professional, you are aware generally that the value
03:14:36 17 of the technology represented by the Haguchi patents
03:14:39 18 is acknowledged worldwide to be extremely large and
03:14:43 19 that it has been licensed all over the world for a
03:14:46 20 lot of money?

03:14:50 21 A. Well, I'm not sure how my credential
03:14:53 22 or experience as a licensing professional would
03:14:56 23 weigh on the notion that it's been licensed
03:15:00 24 frequently for a lot of money. Those don't sound
03:15:04 25 like factual issues.

1 I am aware generally of promotional
2 statements describing the use of the patent. As to
3 whether or not it contains the specific phrases you
4 mentioned, I would need to go back to the documents
5 that describe that to confirm.

6 Q. Mr. Malackowski, did you in forming
7 opinions in this case have any understanding that
8 the Haguchi patent is acknowledged worldwide to be
9 very valuable and that it has been licensed around
10 the world for significant amount of money?

11 MS. TU: Objection.

12 A. I don't believe that that's stated
13 within my report as a basis for my opinions. To the
14 extent that that is contained within Dr. Gale's
15 report to support the conclusions that I draw from
16 him, then I certainly would acknowledge it as an
17 indirect basis, but I don't recall that specifically
18 within his report as I sit here.

19 Q. The Applera/Bio-Rad agreement was
20 negotiated and signed in 2005; is that correct?

21 A. Did you say the Applera/Bio-Rad
22 agreement?

23 Q. Yes.

24 A. I note on page 32 of my report that
25 that was signed in 2006.

Q. That is 13 years before the date of the hypothetical negotiation in this case?

A. Approximately.

Q. One factor that goes to how comparable license agreement is is how close in time it is to the hypothetical negotiation. That's fair; right?

A. Generally, that's fair. There is further consideration such that agreements that come after the negotiation are often discounted because they would not be known or knowable at the negotiation, and for agreements before the negotiation, consideration is given to develop into the market between the date of the agreement and the negotiation.

So, for example, in this case, if the market actually became larger, more successful, more robust, all else being equal, that would suggest that the earlier agreement would understate the royalty.

Q. You are aware there was extensive litigation in Connecticut against a company called MJ?

A. I am aware of that. That was something that was discussed in more detail in a

13:18:48 1 prior Delaware case as it related to the background
13:18:53 2 of the licenses at issue.

13:18:56 3 Q. MJ was found in that litigation to
13:19:00 4 infringe the asserted patents that belonged to
13:19:04 5 Applera; correct?

13:19:08 6 A. That's consistent with my memory,
13:19:09 7 though I don't discuss that within my report here.
13:19:14 8 So I have not refreshed on those specific disputes
13:19:17 9 and resolution for some time. So without going back
13:19:20 10 to the document, I would simply accept your
13:19:24 11 representation for purposes of your questions.

13:19:27 12 Q. Bio-Rad bought MJ that had already
13:19:31 13 been found to infringe; correct?

13:19:34 14 A. I'm sorry, did you say Bio-Rad bought
13:19:36 15 or purchased MJ?

13:19:38 16 Q. Correct. I'll restate it.
13:19:42 17 Bio-Rad bought MJ that had already
13:19:44 18 been found to infringe; correct?

13:19:48 19 MS. TU: Objection.

13:19:50 20 A. Generally, that is consistent with my
13:19:53 21 understanding.

13:20:03 22 Q. And there were at least three
13:20:08 23 different agreements all signed at the same time
13:20:11 24 between Bio-Rad and Applera referencing each other
13:20:16 25 as being all related; correct?

13:20:22 1 A. I do recall the multiple agreements
13:20:26 2 and their interrelationships, that was discussed
13:20:28 3 within my report in the Delaware case. So my memory
13:20:32 4 is consistent with your question. I have not gone
13:20:36 5 back and refreshed on those various agreements for
13:20:39 6 my work here. So I really don't recall the details.

13:20:43 7 Q. And one of those agreements is the
13:20:45 8 realtime instrument, Applera/Bio-Rad agreement, that
13:20:49 9 you are relying upon in this case; correct?

13:20:55 10 A. That is my recollection, that it was
13:20:56 11 one of the three.

13:20:59 12 Q. And you are aware that at the time
13:21:01 13 Bio-Rad signed the agreement you're relying on, the
13:21:06 14 Court was going to have a hearing on whether Bio-Rad
13:21:09 15 was in contempt of an injunction at that time?

13:21:15 16 MS. TU: Objection.

13:21:18 17 A. I do recall and make reference to the
13:21:22 18 fact of the pending injunction within both my first
13:21:26 19 report and my second report. So I am familiar with
13:21:29 20 that, yes.

13:21:41 21 Q. By "pending," you mean there was an
13:21:43 22 injunction that was actually entered and now there
13:21:47 23 was a pending hearing on the contempt of that
13:21:50 24 injunction because Bio-Rad was being accused of not
13:21:54 25 following the injunction order; correct?

03:21:58 1 MS. TU: Objection.

03:21:59 2 A. I don't think I used the word
03:22:00 3 "pending." I think that was your language, but
03:22:03 4 putting that aside, again, at a general level, the
03:22:08 5 premise of your question is consistent with my
03:22:11 6 recollection of the facts.

03:22:14 7 Q. And the pending hearing on the
03:22:16 8 contempt of the injunction was prompted by Applera's
03:22:22 9 complaint that Bio-Rad was not complying with the
03:22:27 10 Court's injunction. You recall that?

03:22:33 11 A. I recall the issue of various
03:22:36 12 anonymous or other employee complaints, though I
03:22:40 13 don't, as I sit here, recall it relating to the
03:22:42 14 injunction as much as the royalty payments. So I
03:22:48 15 can accept that for purposes of your question. The
03:22:50 16 facts will speak for itself. I actually don't
03:22:53 17 recall if that was due to some sort of employee
03:22:56 18 complaint.

03:23:04 19 Q. Is it your testimony you don't recall
03:23:05 20 that Applera had submitted briefing to the Court
03:23:11 21 separate from any Bio-Rad employee that complained
03:23:15 22 of Bio-Rad's violation of the injunction?

03:23:21 23 MS. TU: Objection.

03:23:22 24 A. Although I discuss the issue of the
03:23:24 25 injunction within my two reports, I don't discuss

1 the various pleadings that were filed by whom and
2 what their content was. So I would be speculating.
3 I can't deny that that is what happened from memory,
4 but it's not something that's been the focus of my
5 work.

6 Q. And is it your recollection that the
7 Bio-Rad employee who submitted a letter to the Court
8 called himself Elmer Futterbuck?

9 MS. TU: Objection.

10 A. So a moment ago, I told you I don't
11 recall the specific pleadings or documents related
12 to this issue and I still don't. That said, the
13 persona Elmer Futterbuck is one that I have memory
14 of from my review of the record. It's something
15 that you tend not to forget.

16 Q. Now, it is true, isn't it, that you
17 did not discuss Mr. Futterbuck's letter in the
18 report in this case; correct?

19 A. Correct. I do not.

20 Q. It is also true that you did not
21 discuss any internal Bio-Rad documentation that
22 confirms Mr. Futterbuck's statements to the Court?

23 MS. TU: Objection.

24 A. I don't specifically discuss
25 responsive commentary to such statement.

Q. I want to make sure I understand your answer. It is true, isn't it, that in your report, you did not discuss any internal Bio-Rad documentation or communication that, indeed, confirm that Mr. Futterbuck's statements to the Court were correct?

MS. TU: Objection.

A. So to be clear, I do discuss various evidence related to this issue, specifically on pages 34 and 35 of my report, but I don't call out a response to the persona Elmer Futterbuck. I don't specifically discuss that.

Q. You also do not discuss the contempt proceedings against Bio-Rad for potentially violating the injunction. That's fair; right?

A. My report will speak for itself. I don't recall referencing contempt proceedings specifically, just the issue of the injunction.

Q. You would agree with me that a party that has to go to court when it has been charged with being in contempt of an injunction doesn't have a lot of negotiating leverage in that discussion; is that fair?

MS. TU: Objection.

A. No, I don't think you can make that

13:28:30 1 that testimony so we can talk about it.

13:28:40 2 Q. With respect to the realtime
13:28:44 3 instrument license, Bio-Rad also had a consent
13:28:57 4 judgment entered on the very same patent, the
13:29:01 5 Haguchi patent, by which Bio-Rad is found to
13:29:07 6 infringe and it's permanently enjoined from
13:29:10 7 infringing the Haguchi patent; is that true?

13:29:17 8 MS. TU: Objection.

13:29:18 9 A. My -- my report is not so specific to
13:29:20 10 the patent at issue or the terms of the injunction,
13:29:24 11 only to discuss generally that Bio-Rad was facing an
13:29:27 12 injunction. So I would have to go back and refresh
13:29:32 13 on the documents. That's not something that is
13:29:35 14 addressed within my report.

13:29:37 15 Q. Sitting here today, you don't know
13:29:42 16 one way or the other whether with respect to the
13:29:46 17 very patent at issue in the license you rely upon,
13:29:50 18 the Haguchi patent, there was a consent judgment of
13:29:55 19 infringement validity and permanent injunction
13:29:59 20 against Bio-Rad for the Haguchi patent?

13:30:11 21 A. All that I rely upon is that Bio-Rad
13:30:14 22 was facing an injunction during these negotiations.
13:30:20 23 The background of and leading to that injunction is
13:30:24 24 not discussed with my report, and I don't think it's
13:30:29 25 particularly relevant. Though I do recognize that

13:30:31 1 in the prior case, there was more detail presented
13:30:34 2 on that issue, I simply don't recall as I sit here
13:30:39 3 the facts to be responsive to your question.

13:30:42 4 That said, there is nothing in your
13:30:44 5 question that my memory suggests is inaccurate. So
13:30:47 6 I'm happy to presume that for purposes of any
13:30:51 7 substantial question you have related to my opinions
13:30:53 8 in this case.

13:31:17 9 Q. Applera/Bio-Rad license applied the
13:31:21 10 royalty rate of 15 percent to net sales of licensed
13:31:26 11 realtime thermal cyclers; correct?

13:31:29 12 A. Yes, you and I spoke about that at
13:31:32 13 some length before the break.

13:31:35 14 Q. And those would qualify as
13:31:36 15 instruments; correct?

13:31:41 16 A. I believe that they would be
13:31:42 17 generally regarded as instruments.

13:31:45 18 Q. In this case you are applying the
13:31:47 19 15 percent royalty to instruments, reagents, and
13:31:50 20 chips?

13:31:51 21 A. Yes, as we've discussed, based upon
13:31:53 22 the diversity of the licenses within the benchmark
13:31:57 23 group, as well as the other factors cited in
13:32:01 24 Georgia-Pacific.

13:32:03 25 Q. If you could, please, look on page

13:32:05 1 33.

13:32:16 2 A. Yes.

13:32:16 3 Q. And if you'd, please, look at the
13:32:21 4 third full paragraph on page 33 starting with "I
13:32:24 5 understand."

13:32:28 6 A. Yes.

13:32:28 7 Q. I understand that so long as the
13:32:29 8 licensee remained a licensee under the separate
13:32:32 9 amended and restated thermal cyclers supplier
13:32:34 10 agreement, royalties paid under that supplier
13:32:37 11 agreement for a given royalty-bearing item would be
13:32:40 12 fully deductible from the running royalties due on
13:32:42 13 the same item under this license.

13:32:45 14 Do you see that?

13:32:48 15 A. Yes, ma'am.

13:32:50 16 Q. So the Applera license had a setoff
13:32:55 17 that worked as a stacking provision; correct?

13:33:00 18 A. Well, it's different than the
13:33:01 19 stacking provision concept that we spoke about
13:33:05 20 earlier, which is generally related to licenses paid
13:33:08 21 to third parties on third-party IP. This is really
13:33:15 22 to avoid a double recovery or a double counting of
13:33:19 23 issues, meaning double payment of royalties by the
13:33:22 24 same licensee to the same licensor.

13:33:27 25 Q. So if Bio-Rad paid Applera 7 percent

1 were exactly.

2 Q. If we look on top of page 34 on
3 exhibit one of your report, in the second full
4 sentence you address the 2007 amendment that
5 increased the running royalty to 15.75 percent;
6 correct?

7 A. Yes, ma'am.

8 Q. And for the 2008 amendment, all you
9 say is that it expanded the field of use among other
10 provisions; correct?

11 A. Yes, ma'am.

12 Q. You do not consider that, in fact,
13 that amendment, the 2008 amendment, provided for the
14 rate in the realtime instrument license to go down
15 upon the expiration of the Haguchi patent?

16 A. I do not cite or include such detail
17 within my report, though as we've just discussed, I
18 am familiar with that. I don't believe that that is
19 relevant to my consideration.

20 Q. The parties agree in 2008 that the
21 ongoing royalty in the realtime instrument license
22 would, in fact, be 7.75 percent upon the expiry of
23 the Haguchi patent; correct?

24 MS. TU: Objection.

25 A. I don't recall the percent -- precise

1 success of that product would in part depend upon
2 the results of the negotiation. So I think they
3 went to the discussion -- would go to the discussion
4 assuming there is a competitive relationship with
5 the parties.

6 Q. You did not rely upon or discuss the
7 testimony of Bio-Rad's witnesses who confirmed that
8 ddSEQ is being discontinued?

9 A. That's not cited within my report for
10 the reasons I just described.

11 Q. Is it correct, Mr. Malackowski, that
12 generally lower royalty rates apply when the
13 licensee is required to make significant additional
14 investments in the technology in the market?

15 A. I think it depends upon the context
16 that you're considering. Typically, that's -- in
17 addition that's related to inventor/promoter
18 agreements. And one of the reasons, for example,
19 that university licensor agreements tend to be at
20 lower rates than competitor agreements because the
21 university seeks the investment of the licensee to
22 commercialize the product.

23 Q. Wouldn't you agree though that even
24 outside that, the inventor/promoter scenario, just
25 how much work still needed to be done in order to

1 Q. Mr. Malackowski, it is true, isn't
2 it, that in your report, and we can specifically
3 look at GP5, but even more general, in your report,
4 you do not rely upon Bio-Rad's sales of the ddSEQ,
5 and by that I mean, revenue on the ddSEQ sales?

6 A. Generally speaking, that's correct.
7 I do not call out the specific revenues of ddSEQ in
8 forming my opinion of the use and benefit of the
9 patents-in-suit to 10X.

10 Q. And you do not compare ddSEQ sales to
11 the sales of 10X's products; correct?

12 A. Correct, I don't believe that is
13 necessary, nor informative of the negotiation.

14 Q. Well, let's talk about it. Before
15 the hypothetical, let's say quarter four of 2018,
16 Bio-Rad sold a single one ddSEQ instrument. You did
17 not consider that; correct?

18 A. I am aware of that fact. I believe
19 it's not only within the record generally, but it's
20 cited by Ms. Davis, but I have not taken into
21 account the negative impact on Bio-Rad from the
22 infringement by 10X. To do so would, A, increase
23 the royalty rate, and, B, I have concern that it
24 would extend the analysis of the royalty to beyond
25 the footprint of the invention that's used by 10X to

1 stated another way, an extension of the basis beyond
2 the simple use or footnote of the invention to 10X,
3 and I did not believe it would be appropriate to do
4 so and I feel it's conservative not to and so I have
5 not.

6 Q. By "infringement in the current
7 action," you're speaking about 10X's infringement of
8 the '444 and '277 that you have to presume in the
9 hypothetical negotiation?

10 A. Correct.

11 Q. In Q4 2018 and Q1 2019 combined, so
12 before the hypothetical negotiation, before 10X is
13 selling Next GEM, [REDACTED]

14 [REDACTED] You did not rely on that fact?

15 A. I'm aware of that fact. I believe
16 that's cited in Ms. Davis' deposition or report, but
17 I don't believe it should be imported into the
18 negotiation because to do so would only increase the
19 royalty rate and, therefore, its conservative to
20 not.

21 Q. The last Bio-Rad competes with 10X
22 means that rate goes higher. Do I understand that
23 correctly?

24 A. No, but you're using in your question
25 "compete" in sort of a relative sales way, as does

14:44:03 1 Ms. Davis. I disagree. I think that "compete" is
14:44:05 2 more of a binary decision, that these companies do
14:44:08 3 compete, and there is a competitive threat or there
14:44:10 4 is not, and the fact that a hypothetical licensor
14:44:15 5 has relatively low success in the market compared to
14:44:21 6 a hypothetical competitive licensee that has
14:44:25 7 relatively high success, analyzing the low
14:44:29 8 performance of the licensor is in this case I
14:44:32 9 believe only going to further the demand of the
14:44:35 10 licensor to seek consideration for what is
14:44:39 11 effectively a lost profits claim, and I'm not making
14:44:43 12 such a claim.

14:44:44 13 Q. You're not making such a claim
14:44:45 14 because you have not identified a single lost sale
14:44:48 15 by Bio-Rad because of 10X; correct?

14:44:53 16 MS. TU: Objection.

14:44:55 17 A. I'm not making a lost profits claim.
14:44:58 18 I am seeking to not impute a lost profits element
14:45:03 19 within the Georgia-Pacific royalty framework.

14:45:08 20 Q. That does not exist here because of
14:45:11 21 Bio-Rad's own testimony that you did not rely upon?

14:45:19 22 A. You'd have to refresh my recollection
14:45:20 23 as to which particular testimony you're referring
14:45:22 24 to.

14:45:25 25 Q. Nowhere in your report do you address

14:45:28 1 the testimony of Bio-Rad's corporate witness who
14:45:31 2 said that there was not a single lost sale by
14:45:37 3 Bio-Rad based on 10X?

14:45:42 4 MS. TU: Objection.

14:45:45 5 A. I --

14:45:46 6 Q. You did not rely upon that testimony?

14:45:48 7 A. I do recall reviewing that testimony.
14:45:51 8 My recollection is that it is not as explicit as
14:45:54 9 your question suggests and was more a response from
14:45:59 10 the executive that they couldn't identify a
14:46:02 11 particular client or customer, not that they didn't
14:46:06 12 think there was competitive harm.

14:46:09 13 Q. You've been in, I don't know,
14:46:10 14 hundreds of litigations. You know what a corporate
14:46:14 15 representative is. You do know that,
14:46:16 16 Mr. Malackowski?

14:46:18 17 A. I believe so, yes.

14:46:20 18 Q. And you do know that he was supposed
14:46:23 19 to be -- that he was prepared to address the issue
14:46:27 20 of any lost sales?

14:46:30 21 MS. TU: Objection.

14:46:31 22 Q. Did you know that in reviewing
14:46:32 23 your -- in reviewing Mr. Lebofski's testimony?
14:46:42 24 L-e-b-o-f-s-k-i. I'll repeat the question.

14:47:00 25 Did you know in reviewing

14:47:02 1 Mr. Lebofski's testimony, that he was Bio-Rad's
14:47:06 2 corporate representative regarding any potential
14:47:11 3 lost sales?

14:47:24 4 A. In reviewing any of the depositions
14:47:27 5 of the party witnesses I do pay attention to whether
14:47:30 6 or not they're 30(b)(6) designee and have both
14:47:34 7 corporate and personal testimony. That said, I do
14:47:39 8 not recall what particular categories Mr. Lebofski
14:47:45 9 was designated to address. Certainly not from
14:47:48 10 memory. The deposition may have made that clear,
14:47:51 11 but as I sit here today, I don't recall.

14:47:55 12 Q. And it's a fair assessment of his
14:47:57 13 testimony that he, as Bio-Rad's representative,
14:48:00 14 could not identify a single sale that Bio-Rad had
14:48:10 15 lost to 10X?

14:48:13 16 MS. TU: Objection. Misstates
14:48:13 17 testimony.

14:48:16 18 A. Well, the record will speak for
14:48:18 19 itself. Again, my recollection from reviewing the
14:48:20 20 testimony was that he could not identify a lost sale
14:48:25 21 by name, but that did not mean that there was
14:48:30 22 competitive harm in a loss of sales. So to be more
14:48:33 23 specific, I would have to go back to the transcript.

14:48:40 24 Q. Your opinion is that Bio-Rad and 10X
14:48:42 25 are competitors -- sorry. You claim that Bio-Rad

1 and 10X are competitors and that does not turn in
2 any way on whether 10X has directly and demonstrably
3 impacted Bio-Rad sales of the ddSEQ product?

4 MS. TU: Objection.

5 A. So that's a complicated question
6 because there is multiple parts to it. I do believe
7 the companies are competitors and that the
8 competitive element would be recognized in the
9 hypothetical negotiation. I do believe that first
10 and foremost as a result, the parties would focus
11 their attention under the market approach to other
12 license agreements that reflect a competitive
13 relationship not otherwise distorted by
14 cross-licenses or research limitations or
15 development cooperation, but true arm's length
16 third-party commercial agreements, and that finally
17 that, I did not impute into my royalty calculation a
18 risk of lost sales or lost profits by Bio-Rad. That
19 is a reasonable thing to consider, but if one were
20 to add that to the equation, all else being equal,
21 it would only increase the damages and so to leave
22 it out was conservative.

23 Q. The testimony of Bio-Rad's own
24 witnesses and their records show no direct and
25 demonstrable impact on Bio-Rad's ddSEQ sales.

14:50:28 1 That's correct?

14:50:32 2 MS. TU: Objection.

14:50:32 3 A. I can't answer that question. It's
14:50:33 4 so broad as to the context of the testimony, I
14:50:37 5 haven't read all of the testimony as we've
14:50:40 6 discussed. So I would be speculating.

14:50:44 7 Q. You haven't identified any piece of
14:50:46 8 evidence that shows direct and demonstrable impact
14:50:50 9 by 10X's Next GEM sales on the ddSEQ sales?

14:50:55 10 MS. TU: Objection.

14:50:55 11 Q. Not a single one?

14:50:58 12 MS. TU: Objection.

14:50:59 13 A. I don't agree with that. I think the
14:51:01 14 discussion of competition is relevant, does show
14:51:06 15 impact and is consistent with a royalty analysis as
14:51:11 16 distinct from a lost profits analysis. I am not
14:51:15 17 proposing a lost profits claim that identifies
14:51:18 18 specific lost sales that would have been made by
14:51:21 19 Bio-Rad, for example, under the Panduit test. That
14:51:25 20 could have been done. That would have increased
14:51:27 21 damages, but I haven't done it.

14:51:31 22 Q. At the time of the hypothetical,
14:51:32 23 Bio-Rad had to be open and not lie to 10X; correct?

14:51:40 24 A. Correct. You asked me that exact
14:51:43 25 question before or substantially that question.

14:55:46 1 that is actually able to sell?

14:55:49 2 MS. TU: Objection.

14:55:53 3 A. As a hypothetical, that may be true
14:55:55 4 in certain circumstances. I don't think that's
14:55:58 5 relevant to the context here, but I don't dispute
14:56:04 6 that that could happen.

14:56:46 7 Q. You have not explained in your report
14:56:49 8 why that principle does not apply here given that
14:56:51 9 Bio-Rad has Virtually no sales of a competing
14:56:54 10 product?

14:56:57 11 MS. TU: Objection.

14:56:59 12 A. I think it is a true statement that I
14:57:01 13 do not discuss that principle in this report largely
14:57:04 14 for the reasons which I discussed.

14:57:09 15 Q. I'll repeat it. I mean, I said you
14:57:10 16 have not explained in your report why the principle
14:57:13 17 you address does not apply here given that Bio-Rad
14:57:18 18 has virtually no sales of a competing product before
14:57:22 19 the time of the hypothetical?

14:57:25 20 MS. TU: Objection.

14:57:28 21 A. I have not within my report provided
14:57:30 22 an opinion on the business impact to Bio-Rad from
14:57:36 23 the license vis-à-vis the sales level that could be
14:57:42 24 achieved with or without the license due to
14:57:46 25 competition. That's true. I have not done that.

1 Q. The product you had opined is a
2 direct head-to-head competitor with 10X is the ddSEQ
3 product; right?

4 A. Is there a particular conclusion in
5 my report you want me to refer to? But other than
6 that, generally speaking, yes, those are the
7 products that I viewed as directly competitive.

8 Q. You did not address in your report
9 that around the time of the hypothetical, Bio-Rad
10 knew that it was years away from even having a me
11 too product in the single cell market?

12 MS. TU: Objection.

13 A. I don't know that that's
14 substantively true, and I do not draw such a
15 conclusion or refer to such a statement in my
16 report.

17 Q. If Bio-Rad's own documents stated
18 what I just said, then you would agree with
19 Bio-Rad's own internal documentation and
20 representations about it not having and being years
21 away from having even a me too product in the single
22 cell market?

23 MS. TU: Objection.

24 A. I would have to look at the document
25 you're referring to understand how and why it was

1 prepared and what its context is, and then given the
2 work I'm doing in this case, I would want to
3 understand to what extent the infringement factored
4 into the me too conclusion.

5 Q. You didn't explain in your report how
6 your opinions can square with Ms. Trauzzi's
7 testimony that Bio-Rad's ddSEQ market share would
8 never have edged over 1 percent?

9 MS. TU: Objection.

10 MS. HADZIMEHMEDOVIC: T-r-a-u-z-z-i,
11 Trauzzi.

12 A. Correct, I do not address her
13 testimony in my report.

14 Q. If we assume that it is true, that at
15 the time of the hypothetical, Bio-Rad was years away
16 from having any product capable of meeting customer
17 expectations in the market, would that or would that
18 not alter your opinion regarding the reasonable
19 royalty in this case?

20 A. So first to my last answer, just to
21 clarify, I did not address her testimony on that
22 issue. She is otherwise addressed in my report.

23 To your current question, it would
24 not affect my opinion in this case because I have
25 been careful to not interject that issue into the

15:03:10 1 made that consideration. I've simply concluded they
15:03:13 2 are competitors. As a result, the license should be
15:03:19 3 commensurate with a commercial competitive license
15:03:21 4 as opposed to an inventor/promoter license.

15:03:24 5 Q. You concluded they're competitors
15:03:26 6 without considering Bio-Rad's sales and considering
15:03:29 7 that they sold two instruments in the two quarters
15:03:33 8 preceding the hypothetical negotiation. I think
15:03:35 9 that's fair.

15:03:36 10 MS. TU: Objection.

15:03:40 11 A. I don't think that's a question.

15:03:46 12 Q. Your opinion -- strike that.

15:03:47 13 You concluded in your opinions in
15:03:52 14 this case that Bio-Rad's ddSEQ is a competitor to
15:03:58 15 10X's products and made that conclusion without
15:04:05 16 considering Bio-Rad's sales and the fact that they
15:04:10 17 sold near two instruments in the two quarters
15:04:14 18 preceding the hypothetical negotiation?

15:04:16 19 MS. TU: Objection.

15:06:06 20 A. It is correct that in my report, in
15:06:08 21 Georgia-Pacific factor number five discussing
15:06:11 22 commercial relationships, I do not specifically
15:06:13 23 identify the quantity of units that Bio-Rad has sold
15:06:16 24 as of the date of the hypothetical. I focus on the
15:06:19 25 fact that the companies perceive each other as

competitors and look to what is expected in the future in that it would be within a period of time that Bio-Rad would have products directed to the same applications as 10X. So it is a forward-looking assessment, but I do agree I don't specifically cite the two units or the one unit the year before.

Q. Is it your understanding that 10X in real life does not know that Bio-Rad sold 10 instruments in two quarters preceding the hypothetical negotiation?

MS. TU: Objection.

A. I can't speak to that. I don't know what 10X in real life would know or not know, especially given the extensive litigation between the parties and the public trial.

Q. Bio-Rad has maintained the sales information confidential; correct?

MS. TU: Objection.

Q. In real life?

MS. TU: Objection.

A. I haven't studied Bio-Rad's confidentiality provisions regarding its sales information, who they share it with, to the extent to which they disclose it, whether they share it

15:07:38 1 with market research firms, I don't know.

15:07:49 2 Q. Your testimony is that your
15:07:52 3 reasonable royalty analysis does not include a plus
15:07:55 4 factor to the rate to compensate for the risk of
15:07:59 5 potential lost sales or market share; correct?

15:08:08 6 A. Generally.

15:08:09 7 (Stenographer clarification.)

15:08:13 8 Q. You did not address in your report
15:08:14 9 that Bio-Rad's ddSEQ product has not been broadly
15:08:19 10 adopted due to inferior product specs and inferior
15:08:24 11 manual of options?

15:08:26 12 A. Correct, I don't necessarily believe
15:08:28 13 that that is true, but I have not addressed that
15:08:32 14 issue in my report.

15:08:50 15 Q. We'll let the jury decide.

15:08:51 16 You did not address in your report
15:08:53 17 that Bio-Rad's sales channel is not even willing to
15:08:56 18 pick up ddSEQ?

15:09:00 19 MS. TU: Objection.

15:09:01 20 A. I'm not sure I know what that means.
15:09:04 21 It sounds like you're referring to a particular
15:09:06 22 document or testimony. That's not a passage that
15:09:10 23 comes to mind. So we'd have to refresh my
15:09:13 24 recollection.

15:09:19 25 Q. You did not consider in your report

15:09:23 1 that Bio-Rad's sales personnel refused or do not
15:09:30 2 even want to pick up selling ddSEQ because it's such
15:09:35 3 a failure?

15:09:37 4 MS. TU: Objection.

15:09:39 5 A. I don't know that that's a true
15:09:40 6 statement, A. B, I don't know that if it is true,
15:09:43 7 if that's based upon the environment of the
15:09:47 8 infringement and past infringement, which frustrated
15:09:51 9 those salespeople, but C, I don't specifically
15:09:53 10 comment on those quotes, documents, or testimony
15:10:00 11 that you're generally referring to in my report.

15:10:02 12 Q. 10X offers several lines of single
15:10:20 13 cell products; correct?

15:10:22 14 A. Yes, ma'am.

15:10:25 15 Q. It offers Multiome product that
15:10:28 16 performs ATAC-seq and gene expression. It offers
15:10:32 17 immune profiling products, five prime gene
15:10:35 18 expression products, targeted gene expression
15:10:35 19 products.

15:10:42 20 (Stenographer clarification.)

15:10:48 21 Q. 10X offers Multiome products that
15:10:52 22 perform ATAC-seq and gene expression; immune
15:10:56 23 profiling products; five prime gene expression
15:11:01 24 products; targeted gene expression products;
15:11:04 25 products for crispr-related assays with single cell

1 NGS; products for assays on cell service proteins
2 with single cell sequencing analysis.

3 Is that your understanding,
4 Mr. Malackowski?

5 A. Generally, yes.

6 Q. Bio-Rad does not offer these products
7 at all?

8 MS. TU: Objection.

9 A. I have not done a product to product
10 comparison. I believe there are differences in the
11 product applications that are offered, and I
12 recognize that within my report, specifically page
13 58 where I note that the initial products of
14 RainDance and 10X focused on different applications.

15 I further talk about the fact that
16 that does not dispel the notion of a competitor
17 commercial relationships in a hypothetical and that
18 Bio-Rad had an intention of bringing products to
19 market directed to the same applications of 10X.

20 Q. You do not cite any evidence in your
21 report that shows that Bio-Rad intended to develop
22 the six product lines that I read into the record?

23 MS. TU: Objection.

24 A. I do not by product line call out the
25 specific Bio-Rad competitive response. I have a

1 more general discussion because its the more general
2 discussion that's relevant to my work, which is
3 ultimately related to the selection of the
4 comparable agreements.

5 MS. TU: Counsel, if it's a good time
6 to break, just whenever you're ready. It's been a
7 little bit over an hour.

8 MS. HADZIMEHMEDOVIC: Sure. This is
9 a fine time to break.

10 THE VIDEOGRAPHER: Okay. We're going
11 off the record at 5:13 p.m.

12 (Whereupon, a recess is taken.

13 THE VIDEOGRAPHER: Stand by, please.

14 We are back on the record at
15 5:34 p.m. marking the start of media unit number
16 five.

17 BY MS. HADZIMEHMEDOVIC:

18 Q. Mr. Malackowski, before the break, I
19 identified six 10X Next GEM product lines that
20 Bio-Rad does not offer equivalent products for. So
21 for the six product lines that 10X offers Multitome,
22 immune profiling, five prime gene expression,
23 targeted gene expression, crisper and cell surface
24 protein products, you do not offer an opinion that
25 Bio-Rad has ever lost any money due to 10X selling

15:35:04 1 those particular assays that Bio-Rad doesn't offer?

15:35:14 2 A. Assuming your question is do I agree,
15:35:18 3 correct. I do not do a lost profits calculation or
15:35:23 4 specific quantification of lost profits in general
15:35:25 5 or by product line.

15:35:33 6 Q. Aside from the legal determination of
15:35:35 7 lost profits, you don't do an even more rudimentary
15:35:47 8 analysis even attempting to assess any money Bio-Rad
15:35:57 9 lost due to 10X offering those six product lines
15:36:03 10 that Bio-Rad does not offer?

15:36:05 11 MS. TU: Objection.

15:36:10 12 A. As far as what I would consider a
15:36:13 13 rudimentary analysis, that would be a general
15:36:17 14 competitive assessment, which I think I do offer,
15:36:21 15 but I do not if you mean by rudimentary analysis
15:36:23 16 make a back of the envelope calculation of lost
15:36:26 17 profits or something at such a high level.

15:36:30 18 I have certainly considered that
15:36:31 19 issue. I recognize that injecting such into a
15:36:37 20 hypothetical would only increase the result and,
15:36:39 21 therefore, its conservative not to further that
15:36:43 22 discussion here and I've chosen not to.

15:36:47 23 Q. You have not opined that any loss of
15:36:53 24 sales or any revenue on those product lines by those
15:36:58 25 product lines has happened to Bio-Rad; correct?

15:37:06 1 A. Correct.

15:37:47 2 Q. You have not opined that any of those
15:37:50 3 six Next GEM assays I named competes against Bio-Rad
15:37:56 4 ddSEQ 3 prime RNA-Seq product?

15:38:05 5 (Stenographer clarification.)

15:38:06 6 MS. HADZIMEHMEDOVIC: RNA-Seq, S-e-q.

15:38:16 7 A. Correct, in that I have not done a
15:38:17 8 product line to product line competitive assessment.
15:38:22 9 The purpose of my competitive analysis was more
15:38:24 10 related to the Georgia-Pacific criterion as opposed
15:38:27 11 to a lost profits analysis.

15:38:42 12 Q. You offer no opinion that any of
15:38:43 13 those six Next GEM assays competes against Bio-Rad's
15:38:50 14 attack seek product.

15:38:54 15 A. Same answer.

15:38:59 16 Q. You do not explain anywhere in your
15:39:01 17 report how any of those six product lines either
15:39:08 18 lost sales or lost market share to Bio-Rad; correct?

15:39:15 19 A. The same answer.

15:39:35 20 Q. Is your testimony to the jury going
15:39:38 21 to be that when the parties are sitting at the table
15:39:44 22 with basically perfect knowledge of each other's
15:39:47 23 information, they will think of competition as
15:39:51 24 something different than what they would think of
15:39:55 25 competition in real life?

1 prime gene expression, targeted gene expression,
2 crisper, or cell surface proteins; correct?

3 MS. TU: Objection.

4 A. I don't know that I can agree with
5 that because my analysis did not go into that
6 application level of detail because it was not
7 necessary. So I couldn't foreclose what Bio-Rad
8 might say in response to that question.

9 Q. But you're not aware, sitting here
10 today, of any document that suggests that Bio-Rad
11 was planning and was capable of delivering these six
12 product lines in --

13 MS. TU: Same objection.

14 Q. -- Q2 2019?

15 MS. TU: Objection.

16 A. So I was going to say that's the
17 question you've asked me many times before, but
18 you've interjected the ability to deliver in
19 Q2 2019. That I don't know, but again, not relevant
20 to my analysis for the reasons upon which I rely for
21 a competitive relationship.

22 Q. You do not identify any evidence in
23 your expert report that Bio-Rad, as of the date of
24 the hypothetical negotiation, expected ddSEQ to ever
25 be able to compete with or without 10X?

15:49:06 1 MS. TU: Objection.

15:49:09 2 A. Well, I would agree with that. I
15:49:10 3 think, for example, the June 2025-year plan that I
15:49:15 4 referenced to you in figure 20 confirms that they
15:49:17 5 did intend to compete with 10X.

15:49:35 6 Q. It says nothing. This document says
15:49:37 7 nothing about their true ability to compete with 10X
15:49:43 8 in the market or without 10X in the market --

15:49:48 9 MS. TU: Objection.

15:49:49 10 Q. -- for ddSEQ?

15:49:50 11 MS. TU: Objection.

15:49:52 12 A. Well, turning to figure 21, there is
15:49:55 13 an assessment of their ability to compete with 10X.
15:50:00 14 It talks about the strengths and weaknesses of 10X,
15:50:03 15 as well as other competitors. I will agree with you
15:50:05 16 I do not have documents where Bio-Rad is
15:50:10 17 contemplating their level of success without 10X in
15:50:15 18 the market, because I don't believe that in normal
15:50:20 19 course they're presupposing that 10X would exit the
15:50:24 20 business.

15:50:39 21 Q. You do not offer any opinion or
15:50:41 22 explanation in your report as to why Bio-Rad would
15:50:44 23 be incentivized to seek a royalty on assays it does
15:50:47 24 not offer, but is just as high as the royalty you
15:50:53 25 say Bio-Rad will seek on assays that it says it

15:50:56 1 offers?

15:50:58 2 MS. TU: Objection.

15:51:00 3 A. I disagree with that. I think that
15:51:01 4 the Georgia-Pacific analysis is just that Bio-Rad
15:51:05 5 would seek to have a royalty consistent with the
15:51:10 6 Georgia-Pacific framework relying because of the
15:51:12 7 record of this case primarily upon the market
15:51:15 8 approach as a starting point and the market approach
15:51:21 9 does not vary the rate based upon a given
15:51:26 10 competitive dynamic on a product basis. It varies
15:51:28 11 the rate based generally upon the competitive
15:51:32 12 relationship between the parties broadly, and I
15:51:35 13 think my conclusion is consistent with that.

15:51:40 14 Q. Well, the Caliper license contradicts
15:51:44 15 your statement because it specifically defines
15:51:47 16 competition as direct and demonstrable impact on the
15:51:52 17 other side's sales; correct?

15:51:57 18 MS. TU: Objection.

15:51:59 19 A. Perhaps you can point me to the
15:52:01 20 language that you're referring to.

15:52:28 21 Q. If you'll look on page 30, second
15:52:37 22 paragraph: Running royalty of 15 percent on
15:52:47 23 screening applications, and screening applications
15:52:52 24 were defined in part as those that compete directly
15:52:55 25 with Caliper LapChip EZ Reader or Profiler Pro

15:53:00 1 products to directly and demonstrably impact sales
15:53:04 2 of Caliper's LabChip EZ Reader and Profiler Pro
15:53:08 3 products.

15:53:09 4 Do you see that?

15:53:09 5 A. I do.

15:53:14 6 Q. So there is evidence in the licenses
15:53:16 7 you relied upon of a specific definition of
15:53:19 8 competition, which requires direct and demonstrable
15:53:22 9 impact on the other side's sales, and you use that
15:53:25 10 license as one of your most comparable licenses;
15:53:27 11 correct?

15:53:30 12 A. I do use that --

15:53:31 13 MS. TU: Objection.

15:53:31 14 A. I do use that license. I do make the
15:53:34 15 distinction between competitive and noncompetitive
15:53:38 16 products. I don't believe that the language of the
15:53:43 17 license would suggest that somehow the licensor has
15:53:48 18 to prove on a product-by-product basis that there
15:53:52 19 was an impact on sales in order to get the higher
15:53:56 20 rate. I believe what the license shows is two
15:53:59 21 classifications of products and essentially a
15:54:01 22 presumption that certain products will have
15:54:04 23 competitive effect where others won't.

15:54:09 24 Q. Are you reading that particular
15:54:10 25 language out of the Caliper/RainDance license in

15:54:13 1 considering that license, one of your most
15:54:16 2 comparable licenses, and reading the 15 percent rate
15:54:18 3 as the appropriate one?

15:54:24 4 MS. TU: Objection.

15:54:24 5 A. I didn't understand that question.

15:54:39 6 Q. The license says there has to be
15:54:41 7 direct and demonstrable impact on the sales of the
15:54:45 8 other side for the 15 percent rate to apply;
15:54:50 9 correct?

15:54:55 10 A. Well, so let's look at what it says.
15:54:56 11 So it's talking about a situation where the
15:55:09 12 application is using a RainDance chip reagent for
15:55:11 13 other noninstrument product that competes with
15:55:17 14 Caliper's products to directly and demonstrably
15:55:23 15 impact sales of Caliper's products. I don't read
15:55:27 16 that to say there is an expectation that RainDance,
15:55:32 17 when committing its royalty report, can say, Well,
15:55:35 18 we sold a competitive product, but we don't think
15:55:37 19 you would have made the sale. Therefore, we don't
15:55:39 20 have to pay the higher rate. I think what the
15:55:40 21 agreement is doing is generally defining the
15:55:44 22 category of competition and presuming that within
15:55:46 23 that category of competition, there is an impact on
15:55:49 24 sales.

15:55:58 25 Q. Is it correct that your analysis of

1 competitive rates did not assume the same definition
2 that the RainDance/Caliper license provides for the
3 competitive rate?

4 MS. TU: Objection.

5 A. Well, of course, because the
6 RainDance/Caliper specific terms are specific to,
7 for example, Caliper products. So as a comparator,
8 I simply looked to whether or not the parties at the
9 negotiation would consider themselves competitors,
10 and I concluded that they do consider themselves
11 competitors and I find concurrences on that
12 conclusion from Ms. Davis. So I take comfort in my
13 work.

14 Q. Your work did not assume or determine
15 that there was direct and demonstrable impact on the
16 sales of the licensor by the company you're calling
17 the competitor and the licensee in the hypothetical
18 negotiation?

19 MS. TU: Objection.

20 A. I disagree with that. I think the
21 body of record in this case that I've reviewed
22 suggests that there is direct excessive impact,
23 though I have not specifically done a
24 product-by-product lost sales analysis. I think the
25 evidence at trial will show direct competition and

1 over a dozen million dollars; is that what you're
2 referring to?

3 MS. TU: Objection.

4 A. I don't know what the cost was, but
5 it's my understanding that it was 10X's position
6 that they had alternatives to the patents at issue
7 in the prior case.

8 Q. And Bio-Rad obtained the injunction
9 by representing to the Federal Circuit that 10X was
10 free to sell Next GEM; correct?

11 MS. TU: Objection.

12 A. That I don't know. I've not reviewed
13 the arguments in front of the Federal Circuit.

14 Q. You did not rely upon or consider
15 that in forming your opinions in this case; correct?

16 MS. TU: Objection.

17 A. Correct, to the extent I haven't
18 reviewed it, I could not have relied upon it or
19 considered it.

20 MS. HADZIMEHMEDOVIC: Could we please
21 take a short break?

22 THE VIDEOGRAPHER: Five minutes.

23 MS. HADZIMEHMEDOVIC: Let's maybe do
24 10 minutes, if that's okay.

25 THE VIDEOGRAPHER: Okay. We're going

16:32:33 1 the United States the infringing articles?

16:32:39 2 A. I don't disagree with that.

16:32:47 3 Q. And your opinion is that the ITC's
16:32:53 4 injunction against Bio-Rad on the ddSEQ product has
16:32:58 5 no impact on the hypothetical negotiation in this
16:33:01 6 case?

16:33:03 7 MS. TU: Objection.

16:33:04 8 A. More specifically I have not
16:33:06 9 considered the injunction as part of my work. So I
16:33:11 10 can't give an opinion either way. I don't have
16:33:14 11 enough facts to assess.

16:33:17 12 Q. Were you instructed by Bio-Rad's
16:33:18 13 counsel not to consider it?

16:33:21 14 MS. TU: Objection.

16:33:23 15 A. No, but typically other litigation
16:33:27 16 proceedings are not addressed within the
16:33:33 17 hypothetical. For example, I do not specifically
16:33:36 18 account for the prior Delaware case in the
16:33:41 19 hypothetical in this case. I've dealt with this
16:33:44 20 case uniquely and separately.

16:33:53 21 Q. You did not offer any opinion in your
16:33:57 22 report regarding whether Becton Dickinson and
16:34:00 23 Bio-Rad -- strike that.

16:34:06 24 You did not offer any opinion in your
16:34:08 25 report regarding whether Becton Dickinson or Bio-Rad

C E R T I F I C A T E

I, RICHARD GERMOSEN, CCR No.

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and all objections made at the time of examination
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declare under penalty of perjury under the laws of
California that the foregoing is true and correct.
Dated this 7th day of April, 2021.



RICHARD GERMOSEN,
RDR/CCR/CCR-NJ/CRCR/CSR-CA/CCRR-CA/NYACR/NYRCR
LICENSE NO. 30XI00184700
LICENSE NO. 30XR00016800
California CSR No. 14391
California CRR No. 198